Doherty v. Hayward Tyler, Inc. , ARB No. 04-001, ALJ No. 2001-ERA-43 (ARB May 28, 2004)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 04-001
ALJ CASE NO. 01-ERA-043
DATE: May 28, 2004

In the Matter of:

DENNIS DOHERTY,
COMPLAINANT,

v.

HAYWARD TYLER, INC.,
RESPONDENT

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Edwin Hobson, Esq., *Edwin Hobson, PC, Burlington, Vermont*

For the Respondent:
Mark H. Scribner, Esq., *Carroll & Scribner, St. Louis, Missouri*

FINAL ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINT

This case arises under the employment protection provisions of the Energy Reorganization Act (ERA) of 1974, as amended, 42 U.S.C.A. § 5851 (West 1995). The Complainant, Dennis Doherty, filed a complaint alleging that the Respondent, Hayward Tyler, Inc., fired him in violation of the whistleblower protection provisions of the ERA. On September 23, 2003, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order reinstating the Complainant to his former position and ordering the Respondent to pay back wages in the amount of $125,828, adjusted to the date of tender of an offer of reinstatement. The Respondent filed a timely petition for review of the order pursuant to 29 C.F.R. § 24.8 (2003).

On October 7, 2003, the Administrative Review Board (ARB) issued a Notice of Appeal and Order Establishing Briefing Schedule apprising the parties of their right to submit briefs in support of or in opposition to the ALJ's decision. The Respondent submitted a brief on November 5, 2003, asking the ARB to reverse the ALJ's decision and dismiss the complaint. By letter received by the ARB on December 8, 2003, the Complainant asked the ARB to dismiss the appeal. On February 27, 2004, the Board issued an Order Requiring Clarification, directing the parties to inform the Board how they wished to proceed in light of precedent requiring the Board to review all settlements of cases before the Board arising under the ERA whistleblower provisions. On March 5, 2004, the Complainant and the Respondent filed with the Board a Settlement Agreement, Joint Motion for Approval of Settlement Agreement, Dismissal with Prejudice and Confidential Treatment of Settlement Agreement, which we now review.

The Board requires all parties requesting settlement approval to provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or certify that the parties have not entered into other such settlement agreements. See *Biddy* v. *Alyeska Pipeline Serv. Co.*, ARB Nos. 96-109, 97-015, ALJ No. 95-TSC-7, slip op. at 3 (ARB Dec. 3, 1996). Accordingly, the parties have certified that the agreement represents the entire and only settlement agreement with respect to the Complainant's claims. See Settlement Agreement ¶ 8.

Paragraph 3 states that "Complainant acknowledges that Respondent's actions shall constitute a full and complete settlement of all claims released pursuant to this Agreement, and this Agreement is intended to resolve forever the entire disagreement between Complainant and Respondent." Waiver provisions are limited to the right to sue in the future on claims or causes of action arising out of facts or any set of facts occurring before the date of the agreement. *Johnson v. Transco Products, Inc.*, ALJ No. 85-ERA-7, slip op. at 2 (Sec'y Aug. 8, 1985). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974); *Rogers v. General Electric Co.*, 781 F.2d 452, 454 (5th Cir. 1986). We construe ¶ 3 and the General Release incorporated by reference in this paragraph to be consistent with this precedent.

Paragraph 6 of the agreement states that the Complainant agrees to keep the terms of the agreement, and the facts surrounding it, confidential. The parties have also requested, by joint motion, that the Board order that the terms of the agreement not be disclosed, except as set forth in ¶ 6 of the agreement. The ARB notes that the parties' submissions, including the agreement, may become part of the record of the case and may be subject to the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (West 1996), which requires federal agencies to make certain disclosures unless they are exempt from disclosure under the Act. *Coffman v. Alyeska Pipeline Serv. Co. and Arctic Slope Inspection Services,* ARB No. 96-141, ALJ Nos. 96-TSC-5, 6, slip op. at 2 (ARB June 24, 1996). *See also* Department of Labor regulations, 29 C.F.R. Part 70 (2003). Therefore, the joint motion

requesting the Board to order that the settlement not be disclosed, except as set forth in the agreement, must be **DENIED.**

Paragraph 7 provides that the agreement shall be governed and construed under the laws of Vermont. We construe this choice of law provision as not limiting the authority of the Secretary of Labor and any Federal court, which shall be governed in all respects by the laws and regulations of the United States. *See Phillips v. Citizens' Ass'n for Sound Energy,* No. 91-ERA-25, slip op. at 2 (Sec'y Nov. 4, 1991).

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CONCLUSION

The parties properly executed the Joint Motion for Approval of Settlement Agreement, Dismissal with Prejudice and Confidential Treatment of Settlement Agreement on March 5, 2004, and have asked the ARB to approve their Joint Motion. Accordingly, we **APPROVE** the settlement agreement and **APPROVE** the motion for dismissal with prejudice. The motion for the Board to order confidential treatment of the settlement agreement is **DENIED.**

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge